

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.5890 OF 2006**

Shri Waghjai Devi Endowment
Trust, Kusgaon, through the
President

1. Baban Balkrishna @ Krishna
Varkhade, age 51 years,
Occ: Agri. & Driver
2. Balkrishna @ Krishna Shankar
Varkhade, age 81 years,
Occ: Agri.
3. Dinkar Hari Vare,
age 56 years,
Occ: Agri.
4. Vishwas Balkrishna @
Krishna Varkhade, age 49
years, Occ: Agri.
5. Balkrishna Ramchandra
Vare, age 51 years,
Occ: Agri.
6. Maruti Bhiku Vare,
age 49 years
7. Ananda Bhiku Vare,
age 43 years
8. Rajaram Bhiku Vare,
age 40 years
9. Manoj Baban Varkhade,
age 23 years
10. Sanjay Balkrishna Vare,
age 22 years
11. Kashinath Bala Vare,
age 71 years

All residing at and Post
Kusgaon, Taluka Wai,
District: Satara.

.... Petitioners

- Versus -

1. Sanjiv Kashinath Vare
2. Satish Sahdev Hagwane
3. Shamrao Ramchandra Ghadage
4. Anandrao Shankar Hagwane
5. Shivaji Sonaba Vare
6. Sadashiv Atmaram Vare
7. Kiran Ananda Bagade

All adults, Occ: Agri.,
all residing at and Post
Kusgaon, Taluka Wai,
District: Satara.

.... Respondents

WITH

WRIT PETITION NO.5887 OF 2006

Shri Bahir Dev Endowment
Trust, Kusgaon, through the
President

1. Maruti Bhiku Vare,
age 49 years,
Occ: Agri.
2. Ananda Bhiku Vare,
age 40 years,
Occ: Agri.
3. Rajaram Bhiku Vare,
age 40 years,
Occ: Agri.

All residing at and Post
Kusgaon, Taluka Wai,
District: Satara.

.... Petitioners

- Versus -

1. Sanjiv Kashinath Vare
2. Satish Sahdev Hagwane
3. Shamrao Ramchandra Ghadage

4. Anandrao Shankar Hagwane
5. Shivaji Sonaba Vare
6. Sadashiv Atmaram Vare
7. Kiran Ananda Bagade

All adults, Occ: Agri.,
all residing at and Post
Kusgaon, Taluka Wai,
District: Satara.

.... Respondents

AND

WRIT PETITION NO.5891 OF 2006

Shri Waghjai Devi Endowment
Trust, Kusgaon, through the
President

1. Baban Balkrishna @ Krishna
Varkhade, age 51 years,
Occ: Agri. & Driver
2. Balkrishna @ Krishna Shankar
Varkhade, age 81 years,
Occ: Agri.
3. Dinkar Hari Vare,
age 56 years,
Occ: Agri.
4. Vishwas Balkrishna @
Krishna Varkhade, age 49
years, Occ: Agri.
5. Balkrishna Ramchandra
Vare, age 51 years,
Occ: Agri.

All residing at and Post
Kusgaon, Taluka Wai,
District: Satara.

.... Petitioners

- Versus -

1. Sanjiv Kashinath Vare
2. Satish Sahdev Hagwane

3. Shamrao Ramchandra Ghadage
4. Anandrao Shankar Hagwane
5. Shivaji Sonaba Vare
6. Sadashiv Atmaram Vare
7. Kiran Ananda Bagade

All adults, Occ: Agri.,
all residing at and Post
Kusgaon, Taluka Wai,
District: Satara.

.... Respondents

Shri U.P. Warunjikar for the Petitioners
in all the Petitions.

Shri Dilip Bodke for the Respondents in
all the Petitions.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: OCTOBER 09, 2006

ORAL JUDGMENT:

1. In these three petitions common questions of law and facts arise and, therefore, they were heard together and are being disposed of by this common Judgment.

2. Rule. By consent, rule made returnable forthwith.

3. In all these three petitions the petitioners challenge the orders passed by the Appellate Authority rejecting the applications for condonation of delay in filing the appeals. In Writ Petition No.5890 of 2006, there was a delay of 2 years and 10 months in filing the appeal. In Writ Petition No.5887 of 2006, the delay was

of 83 days in filing the appeal. In Writ Petition No.5891 of 2006, the delay was of 3 months and 6 days in filing the appeal.

4. In Writ Petition Nos.5890 and 5891 of 2006, the petitioners had filed the applications for condonation of delay on the ground that the applicant was employed as a driver in Government service and he could not get the necessary leave as also he had no knowledge about the provisions of law and that, therefore, there was delay as stated above in filing the appeals. In Writ Petition No.5887 of 2006 the applicant has filed the application for condonation of delay on the ground that the applicant was suffering from asthma and had no knowledge of law and, therefore, there was delay of 83 days in filing the appeal.

5. The contention of the petitioners in all these petitions is that when the matters were fixed for hearing of the applications for condonation of delay, the respondents filed an application raising the issue of non-maintainability of the appeal and the matters thereafter were adjourned for hearing on the said application raising the objection to the maintainability of the appeals and the matters regarding the condonation of delay were not heard. It is their case that after hearing the application on the maintainability issue,

the matter was fixed for orders but the learned Appellate Authority instead of deciding the said application regarding the objection to the maintainability of the appeal, proceeded to decide the issue relating to delay in filing the appeals when in fact the matters were not heard in that regard. The contention on behalf of the petitioners is disputed and denied by the respondents.

6. In the course of hearing of the matters, the learned Advocate for the petitioners submitted that the roznama of the proceedings before the lower Appellate Authority clearly reveals that from 10-3-2006 the matters proceeded with respect to the application raising objection regarding the maintainability of the appeals till the date of passing of the orders. The roznama nowhere discloses that the matters were heard in relation to the applications for condonation of delay. He further submitted that the applicants ought to have been given opportunity to lead evidence in support of their applications for condonation of delay. The lower Appellate Court failed to give any such opportunity to the petitioners. According to him, even on this day the petitioners are ready and willing to lead evidence to justify the delay in filing the appeals. Pursuant to the query by the Court as to whether the petitioners have filed any affidavit before the lower Appellate

Court bringing to the notice of the said Court that the matters were merely heard on the point of non-maintainability of the appeals and not on the point of condonation of delay, the learned Advocate submitted that the petitioners are ready and prepared to file the affidavit of the Advocates who had appeared in the matter on behalf of the petitioners to establish the fact that the matter was heard only on the issue of non-maintainability of the appeals and not relating to condonation of delay.

7. The learned Advocate appearing on behalf of the respondents, on the other hand, submitted that the matters were heard also on the point of condonation of delay and accordingly the impugned orders have been passed. He also submitted that the Advocates have not filed any affidavit in support of the allegation on behalf of the petitioners that the matter was heard only on the point of non-maintainability of the appeals and not relating to the applications for condonation of delay.

8. It is well-settled law that in case the parties want to raise any dispute regarding the factual aspect of the proceedings before the Court below or regarding any event in the Court below in respect of which the party wants to contradict the observation in that regard in

the order of the Court below, then it is necessary for the concerned party to file an affidavit in that regard before the concerned Court. If the petitioners want to dispute the fact about the hearing of the applications for condonation of delay and to insist that the matter was heard only in relation to the application regarding the maintainability of the appeals, in spite of the fact that the impugned orders apparently disclose the parties having been heard on the issue of the delay in filing the appeal, it was necessary for the petitioners to file affidavits in that regard before the lower Appellate Authority. Undisputedly, till this date no such affidavit has been filed by the petitioners in any of the said proceedings before the lower Appellate Authority.

9. In case there is any doubt about the recording of any fact in the Judgment, it is necessary to seek appropriate clarification from the Court which has passed the Judgment. The Apex Court in **Chitra Kumari (Smt.) v. Union of India and others**, reported in (2001) 3 SCC 208, while holding that the higher Court should go by what has been recorded in the Judgment regarding the happenings in the Court, clearly ruled that "It is settled law that one has to proceed on the basis of what has been recorded by the court. If any party feels aggrieved by what has been recorded by the courts a

clarification has to be sought from that same court." Undisputedly, the petitioners have not moved for any clarification from the lower Appellate Court till this day.

10. The impugned orders apparently disclose the parties having been heard on the point on which the impugned orders have been passed and the Court having perused the records before dismissing the applications for condonation of delay. It is true that the copy of the roznama produced before me discloses that when the matters were taken up for hearing on 10-3-2006, there was an application filed by the respondents who were the tenants before the lower Appellate Authority raising the issue regarding the non-maintainability of the appeals. The same was recorded as Exhibit-20. It is also true that the subsequent entries disclose the matters having been fixed for the say of the applicants on the said issue and further it was adjourned for arguments. However, it is pertinent to note that the roznama dated 21-2-2006 clearly discloses that the matter was adjourned to 10-3-2006 for hearing on Exhibit-1 i.e. the application for condonation of delay. The roznama undoubtedly, nowhere discloses that the matter was in fact being heard on the said application on 10-3-2006. Nevertheless it is an elementary thing to know that when the appeal is filed before any Appellate Court or

Authority beyond the period of limitation specified for filing of the appeal under the provisions of law, the Appellate Court or Authority cannot proceed to deal with the matter on merits unless the appellant is able to satisfy that the delay in filing the appeal was for sufficient cause. Question of the Appellate Court or Authority going into the merits, including the issue regarding the maintainability or non-maintainability of the appeal, can arise only when the Appellate Court or Authority can have occasion to look into those issues in the appeal. Occasion to look into those issues can arise in case the appeal is filed within the period of limitation. Otherwise, the appellant has to satisfy the Appellate Court or Authority about the sufficiency of the cause for delay in filing the appeal and only after being satisfied about the cause for the delay and the same having been accordingly condoned, the Appellate Court or Authority can apply its mind to the issue regarding the maintainability or non-maintainability of appeal.

11. Being so, as the roznama clearly discloses that on 21-2-2006 the matter was adjourned for hearing of the application for condonation of delay, merely because on the next date the respondents chose to file an application raising the issue regarding the non-maintainability of the appeal and the roznama

further refers to the opportunity to the petitioners about the filing of the reply to the same and further that the matters were adjourned for arguments, that would not be sufficient to construe that the lower Appellate Authority had not heard the applications for condonation of delay; more so when the impugned orders disclose opportunity having been granted to the petitioners of being heard on the said issue. Added to this, there is no affidavit filed by the petitioners before the lower Appellate Authority disputing the fact that they were not given the opportunity of being heard in the matter before passing orders on the applications for condonation of delay. In the circumstances, therefore, merely because the roznama is cryptic or is not happily written giving all the details, that itself will not supersede the specific findings of the Appellate Authority in the impugned orders and it will have to be held that the petitioners were given enough opportunity of being heard on the issue regarding the condonation of delay. Roznama cannot supersede or supplant the finding in the Judgment. And assuming there is any discrepancy between the finding in the Judgment and the recording of roznama, obviously the former has to prevail, unless the concerned Court itself clarifies the things to be otherwise for the reasons to be disclosed in such clarification.

12. While dealing with the issue as regards the cause for the delay in filing the appeal beyond the period of limitation, the learned Advocate for the petitioners drew my attention to the applications filed by the petitioners before the lower Appellate Authority in that regard and submitted that in two of the cases the applicant being employed in Government service, could not get leave and therefore there was delay whereas in the third case the applicant was suffering from asthma and, therefore, he could not file the appeal in time. In the case of the Government employee, the delay in one matter was of more than two years and in the second matter the delay was of more than three months, whereas in the third matter, wherein the applicant was allegedly suffering from asthma, the delay was of 83 days.

13. It is an undisputed fact that apart from bald statement of the petitioners in their applications for condonation of delay regarding the alleged cause for delay, the petitioners had not produced any evidence in support of the applications for condonation of delay. The contention on behalf of the petitioners, however, is that no such opportunity was given to the petitioners in that regard. There is nothing on record to show that the applicants had prayed for any leave of the lower Appellate Court to lead evidence in support of their applications either in the applications themselves or at

any time after the filing of the applications. Needless to say that in case of delay in filing the appeal, the appellant has to produce evidence in support of the application along with the application itself. Question of giving further opportunity to produce evidence can arise only in cases where the applicant/appellant specifically makes a prayer in that regard before the concerned Appellate Court or Authority. In the case in hand, there was no such prayer made by the petitioners.

14. In fact, Order 41, Rule 3-A of the C.P.C. clearly provides that when the appeal is presented after expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by an affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period. Needless to say that such affidavit should be accompanied by the copies of the necessary documentary evidence, if the party desires to rely upon any such documentary evidence.

15. It is further contention on behalf of the petitioners that the petitioners can produce evidence even today if opportunity is given to the petitioners. Question of allowing the party to lead evidence in the writ proceedings under Article 227 of the Constitution

does not arise at all. In any case, It is too late for the petitioners to expect the Court to grant any such opportunity to the petitioners. It would virtually amount to give an opportunity to fill-up the lacunae in the evidence. Since it was the contention of the petitioners that the applicant could not get leave for being in Government service, it was necessary for the petitioners to disclose whether the applicant had in fact made attempt to obtain the leave and such application for leave was rejected. It was necessary for the petitioners to disclose all the details in that regard in the application itself and duly supported by affidavit and documentary evidence. There is no presumption that a person employed in Government service cannot get leave to attend the Court matters. Undisputedly, neither efforts were made by the petitioners before the lower Appellate Court nor even any material in that regard has been produced along with the petitions before this Court. It is too late for the petitioners to insist for further opportunity in that regard.

16. As regards the third petitioner complaining about suffering from asthma, the petitioners, admittedly, had not produced any medical evidence in support of the said contention on behalf of the petitioners. Besides, the application before the lower Appellate Authority did not

disclose the period during which the applicant was suffering from asthma, if at all he was in fact suffering from any such health problem. The petitioners have also not disclosed whether the applicant was under treatment of any doctor in that regard. All these facts were necessarily required to be disclosed in the application itself duly supported by the affidavit and the copies of the necessary documentary evidence. Neither such facts were disclosed in the application nor even in the petition. Neither documentary evidence in that regard was produced before the lower Appellate Authority nor along with the petition.

17. For the reasons stated above, therefore, it is apparent that the contention about non-hearing of the applications for condonation of delay which has been raised solely on the basis of cryptic recording of the roznama is purely an after-thought. The contention lacks bona fide and, therefore, there is no case for interference in the impugned orders nor they justify interference in exercise of writ jurisdiction under Article 227 of the Constitution. On merits no sufficient cause was shown for condonation of delay, and the lower Appellate Court was perfectly justified in refusing to exercise its discretion in favour of the petitioners. Delay cannot be condoned as a matter of course. The appellant approaching the appellate

authority beyond the period of limitation prescribed for filing of the appeal has to establish sufficient cause for the same to the satisfaction of the appellate authority and such authority has to exercise its discretion judiciously, without ignoring the fact that such delay give rise to valuable right in favour of the opposite party and it cannot be taken away without proper justification.

18. In the facts and circumstances of the case, therefore, it cannot be said that the Courts below have acted illegally or have committed any jurisdictional error while passing the impugned orders. Even on merits there is no justification for interference in the impugned orders. In the result, therefore, the petitions are liable to be dismissed and accordingly are dismissed. The rule is discharged with no order as to costs.

(R.M.S. Khandeparkar, J.)

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